IN THE

Supreme Court of the United States

No. 566

JAMES J. LAUGHLIN, Attorney at Law, *Petitioner*

v.

RUSSELL C. HARRINGTON, Commissioner of Internal Revenue, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

James J. Laughlin, an attorney at law, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above captioned case, affirming the judgment of the United States District Court for the District of Columbia dismissing the complaint. Chief Justice Warren extended

the time within which to file the petition for a writ of certiorari to December 10, 1958.

OPINION BELOW

The United States Court of Appeals for the District of Columbia Circuit in a judgment entered on May 29, 1958 affirmed the judgment of the United States District Court for the District of Columbia dismissing the complaint of your petitioner. Petition for rehearing en banc was denied on August 25, 1958. The decision below has not yet been officially reported. A copy of the opinion is annexed hereto.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under the provisions of Title 28, Section 1254(1) of the United States Code.

QUESTION PRESENTED

1. Is not the petitioner denied due process of law when as a taxpayer he enters a valid binding contract with a representative of the Commissioner of Internal Revenue which is repudiated by the Commissioner and which the Court, after hearing, refuses to enforce and the Court of Appeals holds said contract and the action filed pursuant to it to be a suit against the United States to which it has not consented?

STATEMENT OF THE CASE

Petitioner filed a suit for specific performance alleging he had entered a contract with the respondent and that despite persistent demands, the respondent failed to comply with the terms of the contract. Petitioner testified and introduced in evidence the two contracts,

Plaintiff's Exhibits 1 and 2 (Appellant's Appendix 4-10). The contracts covered the two taxable years 1950 and 1952. In consideration for extending the time within which to extend taxes the respondent contracted and agreed that due to certain unusual circumstances existing in the case, to wit the insanity of the Revenue Agent who had investigated the petitioner for the years in question and who had lost the books and records of the taxpayer, that they would make available to the petitioner all books, records, memoranda and reports upon which an assessment was predicated (Appellant's Appendix 6-10). In support of petitioner's case, petitioner testified that he was an attorney at law and identified the two contracts (Appellant's Appendix 17-18). He testified that an agent of the respondent came to see him on the 9th day of March, 1956 and that the agent's name was Schleuter (Appellant's Appendix 18). He testified that at that time two forms were turned over to him by the agent of the respondent (Appellant's Appendix 19). Petitioner testified that additional matter in the form of a contract was put in typewritten form on to the two forms supplied by the agent and that appropriate places were inserted for the signature of the taxpayer and the respondent. Petitioner testified that on March 12, 1956, the agent of the respondent returned to the petitioner's office and the documents were transmitted to him and at that time the agent stated that the documents would be transmitted for either approval or rejection (Appellant's Appendix 20-21). Petitioner further testified that he had been served with a statutory notice of deficiency known as a ninety-day letter and that he was unable to obtain an adequate remedy at law in the Tax Court since the loss of his books and records severely prejudiced his rights to file a petition in the Tax Court and to defend in the

Tax Court and that the respondent should be required to comply with his contract. It was stipulated that petitioner made numerous demands upon the respondent and his agents for compliance with the contract and that after many months of consideration the respondent, through his agents, addressed a communication to the petitioner disavowing the contract, stating that it was null and void and that the agent who had signed the Commissioner's signature had exceeded the statutory authority (Appellant's Appendix 29-36). The petitioner called one Millard Stanton Hunter from the General Counsel's office who testified that under Section 7121 of the Internal Revenue Code there were many authorizations running from the Secretary of the Treasury to sign various documents for various purposes (Appellant's Appendix 44). He testified that Mr. Harrington or Mr. Humphrey could have signed the contracts in question (Appellant's Appendix 45). He testified that the Secretary could have delegated the authority he had to sign these documents (Appellant's Appendix 46). The petitioner called Agent Schleuter to whom the two contracts had been transmitted and he testified that the two contracts, as signed by petitioner, were transmitted to his superiors in the ordinary course of business (Appellant's Appendix 51-53).

The respondent made his opening statement and at the conclusion of his opening statement the court inquired of respondent's counsel Joseph M. F. Ryan whether he was familiar with the *Stange* case and the *Florsheim* case. When he stated he was not, the court stated that he had better familiarize himself with them since they would seem to be two cases that would be pertinent to his defense. The court asked counsel

Ryan whether Section 250(d) was the same statute as involved in the present case and when counsel Ryan respondent "essentially", the court told him to look it up and that he did not want any guessing. The Government introduced the testimony of O. Gordon Delk, Deputy Commissioner of the Internal Revenue Service. He testified he did not know what authority Woodside possessed in March of 1956. He admitted that the two documents in question signed by the respondent and the petitioner were contracts. The respondent then called the actual agent, Eugene Woodside, who signed the Commissioner's signature to the contracts (Appellant's Appendix 56). Woodside testified that for sometime he had the authority to sign the Commissioner's name (Appellant's Appendix 56-59). Woodside testified that after receiving the contracts with the typewritten matter contained in the contract he conferred with one Herman E. Greenland who told him to sign the contracts (Appellant's Appendix 56-59). Greenland, who was later called by the respondent, testified that he did not talk to Woodside on the 12th or 13th of March with respect to the two contracts and did not tell Woodside to sign the Commissioner's signature to the two contracts. Throughout the presentation of the respondent's case the court made numerous suggestions to respondent's counsel Joseph M. F. Ryan as to what questions he should ask, how they should be framed and what evidence he should put on in order to better defend against the claim (Appellant's Appendix 59-60). O. Gordon Delk, who was recalled, testified that he could find no document in existence limiting the power of Eugene Woodside to sign the Commissioner's signature to the two contracts in question. The respondent rested. The matter was argued to the trial judge.

The trial judge entered a judgment denying petitioner's claim for specific performance and holding that the facts in the case were precisely within the scope of *Florsheim Bros. Dry Goods Co.* v. *United States*, 280 U.S. 453, and that the agent Woodside had exceeded his authority in signing the two contracts and thus the Government would be allowed to repudiate and void the terms of the contract. The United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the court below (Appellant's Appendix 63). Petition for rehearing en banc was denied (Appellant's Appendix 64). This petition follows.

REASONS FOR GRANTING CERTIORARI

Surely this Court in *Florsheim Bros. Dry Goods Co.* v. *United States*, 280 U.S. 453, did not mean to confer upon representatives of the Internal Revenue Service acting in behalf of the Commissioner the right to obviate solemn agreements and contracts entered into with taxpayers which are binding on the taxpayers but which the Government is free at any time to renounce and repudiate as a unilateral agreement that is unenforceable in the courts.

ARGUMENT

I.

The decision of this Court in *Florsheim Bros. Dry Goods Co.* v. *United States*, 280 U.S. 453, 50 S. Ct. 215, 74 L. Ed. 542, is distinguishable from the present case and this is not a suit against the United States but is a suit against a Government official who enters a binding contract with the petitioner, a taxpayer, which is enforceable against the taxpayer and under

fundamental precepts of fair play should be enforceable against the respondent Commissioner.

In this case, as we set forth in the Statement of the Case, a binding contract was entered between the respondent and the petitioner (Appellant's Appendix 4-10). The trial court misconstrued the effect of this Court's decision in *Florsheim Bros. Dry Goods Co.* v. *United States*, supra, and held in effect that the contract was not what it purported to be and not what it plainly stated it was but was a unilateral act which the Government was free at any time to repudiate. The trial court had before it this Court's decision in Florsheim which involved an instrument executed pursuant to Section 250(d) of the 1921 Revenue Act. The instrument purported to extend the time within which taxes might be assessed. This Court in speaking of this document stated:

> "The waivers executed by the parties were not contracts binding the Commissioner not to make the assessments and collections after the periods specified. At this time when the waivers were executed the Commissioner was without power under the statute to assess or collect the taxes after the statutory period as extended by the waivers. A promise by the Commissioner not to do what by statute he was precluded from doing would have been of no significance. The waivers do not purport to contain such a promise, Bank of Commerce v. Rose, (D.C.) 26 F. 2d 365; Grelock Mills v. Commissioner, 31 F. 2d 655, and obviously, the Commissioner did not undertake to limit the power of Congress to extend the period of limitations as consideration for the waivers. *The instruments were nothing more than what they were termed on their face—waivers;* and that was all to which the Commissioner was authorized to consent."

We do not quarrel with the decision in Florsheim but say the facts in this case are clearly distinguishable and that the typewritten material which was added to the waivers and to which Mr. Harrington's signature was attached by a representative of the Revenue Service bring this case within the purview of *H & B American Machine Co.* v. *United States,* 11 F. Supp. 48. In that case, as in the present case, a taxpayer added certain typewritten matter to the waiver form which was before this Court in the Florsheim case. In discussing whether typewritten matter should prevail over the printed matter found in the waiver in distinguishing the Florsheim case, the Court stated:

> "The courts long ago laid down the rule for the construction of contracts partly printed and partly written, where there is a conflict between the printing and writing. In such cases the writing will prevail over the printing. Handwriting will prevail over typewriting and typewriting over printing.
>
> "The Supreme Court has followed this rule of construction. In Hagan v. Scottish Ins. Co., 186 U.S. 423, in discussing a marine insurance policy in which a written provision had been inserted that was inconsistent with printed portions of the policy, the court said:
>
> '* * * Courts will not endeavor to limit what would otherwise be the meaning and effect of the written language, by resorting to some printed provision in the policy, which, if applied, would change such meaning and render the written portion substantially useless and without application.'"

The court then proceeded to distinguish the Florsheim case when it stated:

"The plaintiff undoubtedly had some object in view in adding the typewritten words to the formal printed language of the waiver, otherwise we think it must be assumed he would have signed the waiver in the form in which it was prepared by the government. The obvious and manifest purpose of the typewritten provision was to limit the life of the waiver to one year from the date it was signed by the taxpayer or to December 11, 1925, and under the universally accepted rule followed by the courts in the construction of like conflicting provisions in a contract, that was also the legal effect of the added clause. *We are not unmindful, of course, that a waiver has been held not to be a contract, Florsheim Bros. Dry Goods Co. v. United States, 280 U.S. 453, but is essentially a voluntary, unilateral waiver of a defense by a taxpayer.* Strange v. United States, supra. However, the rule of construction as to conflicting printed and written provisions of a contract is necessarily applicable to the construction of like contradictory provisions of a waiver, if the intent of the parties is to be ascertained from the instrument itself."

The refusal of the trial judge to enforce the agreement signed by the representative of the respondent conflicted with the landmark decision of this Court in *United States* v. *Peralta*, 19 Howard, 343, 15 L. Ed. 342, wherein the Supreme Court stated:

"We have frequently decided that public acts of public officers purporting to be exercised in an official capacity, and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified. To adopt a contrary rule would lead to infinite confusion and uncertainty of titles. The presumption arising from the grant itself makes a prima-facie evidence of the power

of officers making it and throws the burden of proof on the party denying it."

Other cases which hold that there is a presumption of authority attaching to acts performed by public officials during the course of their duties are evidenced by:

Perry v. *Page*, 67 F. 2d 635.
United States v. *Chemical Foundation*, 294 Fed. 300.
Young v. *Wempe*, 43 Fed. 354.
United States v. *Royer*, 268 U.S. 394.
Keyser v. *Hitz*, 133 U.S. 138.

The Court of Appeals for the District of Columbia Circuit affirmed the judgment on a different theory from that which was advanced by the trial court, holding that in effect it was a suit against the United States to which it had not consented. An inspection of the record clearly reveals that this is erroneous and that this represents a suit against a Government official who has entered a binding contract with the taxpayer and who would have had redress in the courts against the taxpayer if the taxpayer had sought to obviate the contract.

We say unto the Court that there is involved in this petition the very essence of due process embraced in the Fifth Amendment and that the Government should not be allowed to obviate solemn contracts executed by its officials in the performance of their duties. Because of the importance of the question involved and its effect upon millions of taxpayers who may from time to time enter agreements with officials of the Revenue Service, we ask this Court to grant a petition for writ of certiorari and after full and adequate

hearing to reverse and remand and order the respondent to comply with the terms of his solemn contract.

This petition presents a substantial constitutional issue as to whether a Government official is allowed to repudiate a solemn contract and whether the trial court's acceptance of this right denies the petitioner due process of law. We therefore ask that this Court grant the petition for writ of certiorari.

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